IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(PJC)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S MOTION FOR PROTECTIVE ORDER REGARDING THE CARGILL DEFENDANTS' MARCH 13, 2009 30(b)(6) DEPOSITION NOTICE TO THE STATE

Expedited Consideration Requested

Plaintiff, the State of Oklahoma ("the State"), respectfully moves this Court for a protective order regarding the Cargill Defendants' March 13, 2009 30(b)(6) deposition notice to the State.[1] The topics contained in this deposition notice are largely duplicative of topics raised in previous 30(b)(6) deposition notices served on the State, topics addressed by the State's already-deposed expert witnesses in their reports, and / or topics to which the State has served written discovery responses. Moreover, the topics would require the State to, in essence, marshal all of its factual proof in this case and are therefore overbroad, inefficient and unreasonable -- particularly in light of all of the previous discovery of the State that has occurred in this action. As such, the State is entitled to protection under Fed. R. Civ. P. 26(b)(2)(C)(i), (ii) & (iii), quashing the Cargill Defendants' Rule 30(b)(6) deposition notice. Alternatively, should the Court determine that any portion of that notice is proper, the Court should grant the State an

[1] Pursuant to Fed. R. Civ. P. 26(c)(1) and LCvR 37.1, the State has conferred in good faith with the Cargill Defendants and has been unable to resolve this discovery dispute. The Cargill Defendants oppose this motion, but do not oppose the State's separate motion for expedited consideration.

additional 10 days, or until April 13, 2009 within which to produce a witness to respond to the notice.

I. Background Facts

1. On August 17, 2007, the Cargill Defendants served five separate Rule 30(b)(6) notices on the State, containing a total of 36 subparts, seeking testimony virtually identical to that sought in the present notice. *See* **Ex. 1**. The parties negotiated for some time, but eventually filed cross motions to compel and for protective order which came on for hearing on November 7, 2007. At that hearing, Magistrate Judge Joyner suggested that, during a break, Defendants, including the Cargill Defendants, should explore ways to their Rule 30(b)(6) depositions. *See* **Ex. 2** (Nov. 7, 2007 Hearing Tr., 96:5-9). After doing so, the Cargill Defendants reported:

> Hopefully it will save us some time here. We had discussions both with our co-defendants and with the plaintiffs about the concerns with consolidating the scheduling of 30(b)(6) notices to the State. And one of the primary concerns of the defendants as a whole are proceeding to have specific depositions for -- we want Cargill specific questions. And to the extent that we've asked issue topics and notices, other defendants also may want to join in and ask questions of their own on those same topics. So we're certainly willing to coordinate, so when we get to topics all of the defendants can in the same day or however many days proceed to ask questions on those topics. However, we want to be clear that, you know, *Cargill will ask Cargill specific questions, Peterson will ask Peterson specific questions, George's and so on*. And in agreeing to coordinate in this way, our co-defendants also want to join us in the discussion of what are the proper topics that we should go with. And so, we proposed a procedure that I think will work and we remain optimistic that by -- that it will work. And by December 3rd, we'll get together with our co-defendants and we'll put together a list of topics. And these are the topics that we want to proceed with and proceed with depositions and scheduling them in such a manner that if it's alleged runoff which is one of the examples of the Cargill notice, for instance, the State will come back and tell us, you know, well, I think this is one witness and we say, well, we have seven defendants, how much time, and we'll engage in that discussion and work that out after we look at these topics that are jointly agreed topics, *but yet each defendant will have specific questions relating to their company on those topics*. And then after December 3rd when we get the State this list of topics, we expect some going back and forth on the propriety of the topics as well as the number of witnesses and the number of time -- the amount of time we need to complete those depositions. But this is the way to start the conversation in such a way that all these distinct topics the defendants can schedule depositions in a

> way hopefully that we can get, you know, the same witness if they're taking about the same kind of issues, to *address them for each company specific*. But we're not, you know, waiving the right for seek company specific information, we're just saying we will coordinate together these topics so we can do it in the same time frame. So we've agreed to get this list to the plaintiff's counsel by December 3rd and do the best coordinated list that we can do. As of December 3rd the defendants as a whole are not representing this as the end-all, be-all list for everyone, but these are -- this will be our list as of December 3rd on how we want the topics that we can proceed on in this manner.

Ex. 2 (Nov. 7, 2007 Hearing Tr., 96: 14-98:25) (emphasis added). This agreement was done without prejudice to the rights of a Defendant to seek an individual Rule 30(b)(6) deposition, and without prejudice to the State's objection to doing so. **Ex. 2** (Nov. 7, 2007 Hearing Tr., 100:15-20).

2. On March 13, 2009, some three years after discovery commenced in this case and slightly more than a month before the discovery cut-off, the Cargill Defendants nevertheless served a broad-reaching 30(b)(6) deposition notice on the State, containing 37 subparts, and which is virtually identical to the August 2007 Rule 30(b)(6) topics. *See* **Ex. 3**. This deposition notice, divided into 37 subparts, covers the following general topics: (1) the human health hazards which give rise to the Cargill Defendants' liability, (2) the control the Cargill Defendants exercise over their growers, (3) the legal violations which give rise to the Cargill Defendants' liability, (4) the run-off and releases of poultry waste and its constituents which give rise to the Cargill Defendants' liability, and (5) the pollutants and contaminants which give rise to the Cargill Defendants' liability. *See id.*

3. Many of these topics closely overlap and are subsumed within the topics in Defendants' earlier consolidated 30(b)(6) notices. *See* **Exs. 4 and 5**. By way of example, and without limitation, the earlier 30(b)(6) notices covered at a minimum the following overlapping topics: (1) complaints or violations of Oklahoma statutes or regulations of any poultry operation

(7/1/08 Notice, topic #3); (2) complaints of any discharges of poultry waste to IRW state waters (7/1/08 Notice, topic #4); (3) complaints alleging contamination of IRW state waters from handling and disposal of poultry waste (7/1/08 Notice, topic #5); (4) ecological or environmental impacts resulting from poultry waste (7/1/08 Notice, topic #6); (5) occurrences where any IRW poultry operation failed to properly manage, store or dispose of poultry waste (7/1/08 Notice, topic #7); (6) ecological or environmental impacts resulting from any poultry operation in the IRW failing to properly manage poultry waste (7/1/08 Notice, topic #8); (7) complaints or violations of Oklahoma statutes or regulations involving any integrator (7/1/08 Notice, topic #9); and (8) constituents of poultry waste (7/1/08 Notice, topic #13).

4. The Cargill Defendants attended and participated in these 30(b)(6) depositions.[2] As such, the Cargill Defendants have already had the opportunity, pursuant to the agreement of the parties announced in Court on November 7, 2007, to question the State's witnesses on many of the topics contained within their March 13, 2009 30(b)(6) deposition notice.

5. Further, many of the 30(b)(6) topics are subsumed within the State's non-damages expert reports. By way of example, and without limitation, these non-damages expert reports covered the following topics: the human health hazards which give rise to the Cargill Defendants' liability were covered in Drs. Teaf's, Harwood's and Lawrence's reports; the control the Cargill Defendants exercise over their growers was covered in Dr. Taylor's report; the run-off and releases of poultry waste, as well as the pollutants and contaminants contained therein, which give rise to the Cargill Defendants' liability were covered in Drs. Fisher's, Engel's, Olsen's, Cooke's, Welch's and Stevenson's expert reports.

[2] The Cargill Defendants are participants in a joint defense of this action.

6. All of the State's testifying non-damages experts have been deposed by Defendants. The Cargill Defendants attended and participated in these depositions. As such, the Cargill Defendants have already had the opportunity to question the State's witnesses on many of the topics contained within their March 13, 2009 30(b)(6) deposition notice.

7. Yet further, many of these topics are subsumed within the State's responses to interrogatories and requests for admission served by the Cargill Defendants. *See* **Exs. 6, 7, 8, 9, and 10**. Indeed, to date, the State has responded to 39 interrogatories (not including subparts) served by the Cargill Defendants. These interrogatories have covered areas which cover substantially all of the topics on the Rule 30(b)(6) notice as indicated on the table attached hereto as **Exhibit 11**.

8. Yet further, the State has responded to at least 70 requests for production from the Cargill Defendants. *See* **Exs. 12, 13, and 10**. Many of the documents produced in response to these requests for production cover the topics on the Cargill Defendants' 30(b)(6) notice. Moreover, the Cargill Defendants, joining with the other Defendants, on March 16, 2007 served a battery of 250 Requests for Admission (coupled with a request for production of documents in instances in which the State did not unqualifiedly admit each request) to which the State responded. *See* **Ex. 14**. Additionally, on March 19, 2009 the State has responded to an additional 14 requests for admission served separately by the Cargill Defendants. *See* **Ex. 10**.

9. And finally, the Cargill Defendants, together with the other Defendants with whom they are pursuing a joint defense, are engaged in a deposition blitzkrieg of the State. Since March 1, 2009, Defendants have noticed at least 37 depositions, not counting expert depositions already scheduled during the same period of time. Many of these depositions are of

State employees who may well have responsive information to the topics on the Cargill Defendants' 30(b)(6) notice.

10. In short, the Cargill Defendants have already had ample opportunity to conduct discovery on the topics contained within their March 13, 2009 30(b)(6) notice.

II. Legal Standard

Pursuant to Fed. R. Civ. P. 26(c)(1), a court may, for good cause, issue an order to protect a party from annoyance, oppression, or undue burden or expense, including forbidding discovery, limiting the scope of discovery to certain matters, or specifying the time and place of discovery. Indeed, a court must limit the extent of the discovery otherwise allowed under the rules if it determines that (1) the discovery being sought is unreasonably cumulative or duplicative, (2) the party seeking the discovery has had ample opportunity to obtain the information by discovery in the action, or the burden or expense of the proposed discovery outweighs its likely benefit. *See* Fed. R. Civ. P. 26(b)(2)(C)(i), (ii) & (iii).

III. Argument

As demonstrated above, the Cargill Defendants agreed in Court to ask "Cargill specific" questions at the consolidated Rule 30(b)(6) depositions conducted in this matter. The Cargill Defendants have had more than ample opportunity to do so at the many 30(b)(6) depositions conducted in this case. Now, well into the eleventh hour of the case, they attempt to resurrect the same individual discovery they served a year and a half ago. The discovery being sought now by the Cargill Defendants in their 30(b)(6) deposition notices is unreasonably cumulative or duplicative of other discovery conducted by the Cargill Defendants and their co-defendants. Moreover, also as demonstrated above, the Cargill Defendants have had ample opportunity to obtain the information by prior discovery in the action. That the Cargill Defendants squandered

their opportunity to ask Cargill-specific questions at the previous 30(b)(6) and expert depositions is no fault of the State, and the State should not be put through the time and burden of reproducing its witnesses so that the Cargill Defendants can simply have a second bite at the apple. *See, e.g., Cummings v. General Motors Corp.*, 2002 U.S. Dist. LEXIS 27627, *17-18 (W.D. Okla. June 18, 2002) (granting protective order where 30(b)(6) notice was duplicative of other notices); *Equal Employment Opportunity Commission v. Vail Corporation*, 2008 WL 5104811, *2 (D. Colo. Dec. 3, 2008) (granting protective order and limiting topics where 30(b)(6) notice was duplicative of prior depositions and written discovery).[3]

In addition to being unreasonably cumulative and duplicative of prior discovery, the Cargill Defendants' 30(b)(6) notice, in essence, seeks the State to lay out its entire case against the Cargill Defendants. As such, the 30(b)(6) notice is also overly broad, inefficient and unreasonable, and thus unduly burdensome. As explained in *In re Independent Service Organizations Antittrust Litigation*, 168 F.R.D. 651 (D. Kan. 1996), "even under the present-day liberal discovery rules, [a defendant] is not required to have counsel 'marshal all of its factual proof' and prepare a witness to be able to testify on a given defense or counterclaim." The same rationale obviously applies with respect to a plaintiff. The rule expressed in *In re Independent Service Organizations* "holds especially true when the information sought is likely discoverable from other sources." *See SmithKline Beecham Corp. v. Apotex Corp.*, 2000 U.S. Dist. LEXIS 667, *26-29 (N.D. Ill. Jan. 24, 2000) (denying motion to compel); *see also CSX Transportation, Inc. v. Vela*, 2007 U.S. Dist. LEXIS 83240, *12-13 (S.D. Ind. Nov. 8, 2007) ("Defendants may not serve a Rule 30(b)(6) notice for the purpose of requiring CSXT to marshal all of its factual

[3] *Vail Corporation* also limited the 30(b)(6) deposition to seven hours, regardless of the number of designees. *See* 2008 WL 5104811, *1 & 3. In the event the Court does not forbid the 30(b)(6) notice in its entirety, the noticed deposition here should be for no more than seven hours.

proof and prepare a witness to be able to testify on a particular defense"); *Lipari v. U.S. Bancorp, N.A.*, 2008 WL 4642618 * 6-7 (D. Kan. Oct. 16, 2008) (Rule 30(b)(6) notice encompassing all allegations of complaint is overly broad and warrants protective order).

In addition, the task of marshalling the factual proof to educate a Rule 30(b)(6) designee on so many topics necessarily intrudes upon the work product of counsel for the State because counsel would have to select documents from the larger universe of documents produced in the case in order to prepare the 30(b)(6) witness. *See, e.g, Sporck v. Peil,* 759 F.2d 312, 317 (3d Cir. 1985) (production of documents used to prepare deposition witness invades attorney work product); *see also U.S. v. District Council of New York City and Vicinity of United Broth. of Carpenters and Joiners of America*, 1992 WL 208284 (S.D.N.Y. Aug. 18, 1992) (In Rule 30(b)(6) deposition of FBI agent, counsel's conversations regarding the case, which reflect his/her thoughts and strategy, are classic work product and thus protected). Because counsel's opinion work product is accorded an almost absolute protection from discovery, *Id.*, and because the Cargill Defendants have had multiple opportunities for adequate discovery, the Court should not allow this duplicative discovery to go forward.

Finally, especially in light of the other discovery being conducted by both sides in this case, the 21 days set forth in the deposition notice is inadequate to locate and educate a Rule 30(b)(6) witness on the 37 topics set forth in the notice. Should the Court hold that any part of the notice is proper, the Court should grant the State an additional ten days, or until April 13, 2009, within which to present its Rule 30(b)(6) witness.

In short, the Cargill Defendants' March 13, 2009 30(b)(6) deposition notice is nothing but an improper effort to harass the State with duplicative, burdensome discovery. A protective order is warranted.

IV. Conclusion

WHEREFORE, premises considered, the State's motion for a protective order regarding the Cargill Defendants' March 13, 2009 deposition notice to the State should be granted.

Respectfully Submitted,

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